STATE OF MICHIGAN

IN THE SUPREME COURT

JOAN M. GLASS,

Plaintiff-Appellee,

v.

Supreme Court No. 126409
Court of Appeals No. 242641
Alcona Circuit Court No. 01-010713-CK

RICHARD A. GOECKEL and KATHLEEN D. GOECKEL,

Defendants-Appellants
_____/

AMICUS CURIAE BRIEF OF

DEFENDERS OF PROPERTY RIGHTS,

A WASHINGTON, D.C. NON-PROFIT CORPORATION

Submitted by:
Allan Falk
Allan Falk, P.C.
2010 Cimarron Dr.
Okemos, MI 48864-3908
(517) 381-8449

In association with:
Nancie G. Marzulla,, Esq.
Defenders of Property Rights
1350 Connecticut Ave. N.W., Suite 410
Washington, DC 20036
(202) 822-6770

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Court Rules

Miscellaneous

STATEMENT OF THE BASIS OF JURISDICTION

OF THE COURT OF APPEALS

The decision of the Court of Appeals which Plaintiff-Appellant seeks to have reviewed was issued May 13, 2004; leave to appeal was timely sought. MCR 7.302(C)(2)(a) This Court has jurisdiction pursuant to Const 1963, art 6, § 4 and MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED IN THIS BRIEF

I. Under Michigan Law, do owners of property abutting the Great Lakes hold title to the water's edge free of any public trust?

The Trial Court answered:	No
Plaintiff-Appellant answers:	No
Defendants-Appellees answer:	Yes
The Court of Appeals answered:	No
Amici Curiae Defenders of Property Rights answers:	Yes

II. Does expansion of the reach of the public trust doctrine to take title to private property, without just compensation violate fundamental principles of federal constitutional law?

Trial Court answered:	Not answered
Plaintiff-Appellant answers:	No
Defendants-Appellees answer:	Yes
Court of Appeals answered:	Not answered
Amici Curiae Defenders of Property Rights answers:	Yes

INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders is a national membership organization with 16,000 members, many of whom reside in Michigan. Defenders' mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty.

Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursions into protections guaranteed by the Bill of Rights. Since its inception, Defenders has participated in every major property rights case before the U.S. Supreme Court. *See, e.g., Palazzolo v Rhode Island*, 533 US 606 (2001); *Solid Waste Agency of Northern Cook County v US Army Corps of Engineers*, 531 US 159 (2001); *City of Monterey v Del Monte Dunes at Monterey, Ltd*, 526 US 687 (1999); *Phillips v Washington Legal Foundation*, 524 US 156 (1998); *Suitum v Tahoe Regional Planning Agency*, 520 US 725 (1997); *Dolan v City of Tigard*, 512 US 374 (1994); *Bennett v Spear*, 520 US 154 (1997); *Keene Corp v United States*, 508 US 200 (1993); and *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992).

In this case, the Court of Appeals has expanded the public trust doctrine, in direct contravention of both controlling Michigan law and federal constitutional law, resulting in the taking of Defendants-Appellees' private property rights. *Amicus Curiae* and its members have a substantial interest in seeing that this impermissible expansion be struck down as violative of Michigan and federal constitutional law.

SUMMARY OF ARGUMENT[1]

The decision of the Court of Appeals, by expanding the reach of the public trust doctrine so as to transfer title to private property from land owners and place it into the hands of the State, without payment of just compensation, directly contravenes over 100 years of established precedent by this Court regarding the limited nature of the public trust. This Court has specifically rejected attempts by litigants to expand the reach of the public trust beyond the water's edge. In *Hilt v Weber*, 252 Mich 198, 205; 233 NW 159 (1930), the Court held that the boundary for legal title purposes is the water's edge and not so-called "meander" lines:

> It has frequently been held, both by federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered, and that *the waters themselves constitute the real boundary.*

(emphasis in original) (internal citation omitted). And as this Court more recently observed in *Peterman v DNR,* 446 Mich 177, 193; 521 NW2d 499 (1994): "The title of the riparian owner follows the shore line under what has been graphically called 'moveable freehold.'". By holding in this case that "[a]lthough the riparian owner has the exclusive right to utilize such land while it remains dry, because it once again may become submerged, title remains with the state pursuant to the public trust doctrine," *Glass v Goeckel*, 262 Mich App 29, 40; 683 NW2d 719 (2004), the Court of Appeals directly contravened over a century of well-established Michigan law.

Furthermore, transferring the title of the land between the high water mark and the water boundary from private riparian owners to the State plainly results in a massive taking of thousands of acres of beachfront land, in violation of fundamental federal law. The taking of title to property, no less than the government's condemnation of land or physical invasion of

[1] Although not required by MCR 7.306(B), this summary is provided voluntarily in an effort to assist the Court's review.

land, is prohibited under the Fifth Amendment unless just compensation is paid. *See, e.g., Hughes v Washington*, 389 US 290, 294-298; 88 S Ct 438; 19 L Ed 2d 530 (1967) (Stewart, J, concurring) ("Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property – without paying for the privilege of doing so."); *Yee v City of Escondi*do, 503 US 519, 522; 112 S Ct 1522; 118 L Ed 2d 153 (1992) ("Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation.").

The State of Michigan possesses 3288 miles of shoreline, of which 70% is currently privately owned. *See* State of the Beach Report on Michigan (Surfrider Foundation 2004) *available at* www.beach.com/stateofthebeach2004/05-sr/state_summary.asp. Thus, more than 2,300 lineal miles of property in question are privately held, and will be converted to public land if the Court of Appeals' decision is not countermanded. Such a massive outright seizure of private property, along with the potential just compensation liability for the State of Michigan, Const 1963, art 10, § 2, must be taken into account in considering whether to overrule settled Michigan concepts regarding riparian rights.[2]

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[2] In reviewing these issues, the Court should recognize that there is no suggestion of any shortage of public recreational land or access to water for recreational purposes in the State of Michigan. Indeed, Michigan already owns 30% of beachfront land, and ranks fifth in the United States in the amount of state-owned land available for recreation. *See* State of the Beach Report on Michigan. The extensive state ownership of land "provides tremendous recreational opportunities for the public." *Id.* Moreover, significant state resources are devoted to maintaining the more than 1,300 government-run public access sites that already exist in Michigan. *See* Chris Tauber, *10 Best Boating Sites*, Boating Life, July/August 2004 *available at* http://www.boatinglife.com/article_content.jsp?ID=34045. Of course, if the State of Michigan feels the need to acquire and appropriate more land for the benefit of the public, it must do so according to constitutional principles.

This case thus presents an important opportunity for this Court to reaffirm its commitment to protect and preserve settled private property rights, and to ensure that the public trust is not impermissibly expanded so as to result in the loss of private property rights, in violation of settled Michigan law and fundamental federal constitutional law.

STATEMENT OF FACTS

Defendants-Appellees, Richard A. Goeckel and Kathleen D. Goeckel, own lakefront property on Lake Huron, across highway U.S. 23 from property owned by Plaintiff-Appellant. At the time that the Goeckels purchased their riparian property in 1997, they received title to their riparian property to the water's edge.

On May 10, 2001, Plaintiff-Appellant filed a Complaint in the Circuit Court for Alcona County against the Goeckels, amended on September 17, 2001, claiming that the Goeckels had interfered with her claimed right to walk along the shore of Lake Huron lying below and lakeward of the ordinary high-water mark on their property. App, 23a. [3]

The Goeckels filed a Motion for Summary Disposition, arguing that, as a matter of law, Plaintiff-Appellant was not entitled, over their objections, to walk across the beach fronting the Goeckels' property between the ordinary high-water mark and the lake. App, 26a. The trial court, stating that "there is no clear precedent here," granted summary disposition in favor of Plaintiff-Appellant on the following basis:

> [I]t appears to this Court that Plaintiff has the better argument and the Court therefore rules in Plaintiff's favor. The Great [L]akes Submerged Land Act, MCL 324.32501 *et seq* [.], does provide for a specific definition of the high water mark of Lake Huron and does seem to support the argument that the Plaintiff's [sic] have the right to use the shore of Lake Huron lying below and lakewards of the natural ordinary high water mark for pedestrian travel.

App, 4a.

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[3] In 1967, when Plaintiff-Appellant purchased non-riparian property located on the west side of U.S. 23, she also purchased an express "easement for ingress and egress to Lake Huron over the North fifteen (15) feet" of the Goeckels' property. App, 3a. In her 2001 Complaint, Plaintiff-Appellant also alleged that the Goeckels had interfered with this express easement, but the issues regarding her express easement across the Goeckels' property were resolved and are not part of this appeal.

Thereafter, the Goeckels claimed an appeal to the Michigan Court of Appeals. The Court of Appeals reversed the trial court, holding that the Goeckels could "properly prohibit [Plaintiff-Appellant] from traversing beyond the waters' edge while adjacent to [the Goeckels'] property." *Glass v Goeckel*, 262 Mich App 29, 683 NW2d 719 (2004). However, the Court further held that the Goeckels' only have the right to "exclusive use" of their land between the ordinary high water mark and the water's edge on their property and that the actual title to such land lies with the State:

> Although the riparian owner has the exclusive right to utilize such land while it remains dry, because it once again may become submerged, title remains with the state pursuant to the public trust doctrine. . . . It is therefore clear that, in this case, defendants' riparian rights provided them with the exclusive use of the relicted land and beach in front of their land up to the edge of Lake Huron. Although the state holds title to land previously submerged, the state's title is subject to the riparian owner's exclusive use, except as it pertains to navigational issues. However, if and when the Great Lakes rise, the riparian owner no longer has exclusive use to that submerged land, for the state's title in public trust for navigational purposes becomes paramount.

Id. at 40-43. It is this unprecedented and unacceptable revision of the public trust doctrine and resultant seizure of private property that prompted *amicus* Defenders of Property to seek and obtain permission to participate in the argument of this important case.

ARGUMENT

ISSUE I: Under Michigan Law, owners of property abutting the Great Lakes hold title to the water's edge free of any public trust.

Standard of Review

Summary disposition rulings, whether under MCR 2.116(C)(8), (9), or (10), are reviewed *de novo* on appeal. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52; 684 NW2d 320 (2004) (subrules (C)(8) and (10)); *Abela v General Motors Corp*, 257 Mich App 513, 517-18; 669 NW2d 271 (2003).

Where, as here, a case involves property rights, *de novo* judicial review represents the minimum that comports with constitutional standards. *Miller v Dep't of Treasury (Revenue Div)*, 385 Mich 296, 334-335; 188 NW2d 795 (1971) (Brennan, J, dissenting). Generally, issues of constitutional dimension are also reviewed *de novo* on appeal. *County of Wayne v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

Analysis

The Expansion of State Ownership and Control of Private Property Through the Public Trust Doctrine, as Implemented by the Court of Appeals' Holding Now Under Review, Conflicts with Settled Michigan Law, and Effectuates a Seizure of Private Property Without Just Compensation.

In this case, the Court of Appeals held that the owner of beachfront property has only the possessory use of, but not title to, land between the high water mark and the water's edge:

> Although the riparian owner has the exclusive right to utilize such land while it remains dry, because it once again may become submerged, title remains with the state pursuant to the public trust doctrine.

Glass v Goeckel, supra, 262 Mich App at 40. This expansion of the reach of the public trust doctrine to dry land directly contravenes more than a century of Michigan property law restricting the public trust doctrine's application to submerged land below the water's edge.

The Court of Appeals' decision directly contravenes this Court's decision in *Hilt v Weber*, 252 Mich 198, 205; 233 NW 159, 161 (1930), which holds that the beachfront owner holds title to the land between the high water mark and the water, and that the boundary line moves with the water:

> The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, *and not for the purpose of limiting the title of the grantee to such meander lines*. It has frequently been held, both by the federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered, and that *the waters themselves constitute the real boundary*.

(citing *Hardin v Jordan*, 140 US 371; 11 S Ct 808; 35 L Ed 428 (1891) (emphasis in the original; citations and quotation marks omitted). This foundational principle of land ownership in Michigan was reaffirmed in *Peterman v DNR*, 446 Mich 177, 193; 521 NW2d 499 (1994) (quotation marks and internal citations omitted):

> [W]ith regard to any riparian owner, this Court has long held that the right to acquisitions to land, through accession or reliction, is itself one of the riparian rights. Hence, the title of the riparian owner follows the shore line under what has been graphically called "moveable freehold."

See also Michigan Land Title Standards § 24.6 (5th ed) ("The Waterfront Boundary Line of Property Abutting the Great Lakes is . . . the naturally occurring water's edge . . . .").[4]

That the State of Michigan holds certain public property not as an outright fee holder, but in trust for the use and benefit of its citizens, is a concept that can be traced back more than 100 years. *State v Lake St Clair Fishing and Shooting Club*, 127 Mich 580, 586 ff; 87 NW 117

[4] Also, the practical implications of the lower court's decision are staggering. If the Court of Appeals' decision is upheld, approximately 2,300 square miles of land now privately owned will, in one fell swoop, be deemed held in public trust. *See* State of the Beach Report on Michigan (Surfrider Foundation 2004) *available at* www.beach.com/stateofthebeach2004/05-sr/state_summary.asp.

(1901). But the doctrine has not hitherto been employed to seize title to land long established as being in private hands.

Since the doctrine was first adopted, Michigan courts have clearly delineated a number of important restrictions on the public's rights under the public trust doctrine, in terms of both the geographic extent and the scope of public use permitted. For example, in *Sterling v Jackson*, 69 Mich 488, 501; 37 NW 845 (1888), this Court found that the public's paramount right of navigation did not include the right to hunt over riparian-owned land. *Id.* at 497. In *Hilt v Weber, supra*, 252 Mich at 206, the Court held that the public's trust title in Great Lakes submerged lands did not extend to government survey meander lines, but ended at the water's edge. *Id.* And, in *Moore v Sanborne*, 2 Mich 519, 526 (1853), the Court held that the public's right to the use of streams embraces those streams capable of floating mill logs or any other thing for any purpose having commercial value.

Since 1930, Michigan courts have been steadfast in rejecting invitations to expand the reach of the public trust beyond the water's edge. In *Hilt v Weber, supra,* litigants urged that:

> Public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the state and promising financial gain to its residents, and to conserve natural advantage for coming generations.

252 Mich at 224. The *Hilt* Court acknowledged the existence of the "trust doctrine" in Michigan since 1843. *Id.* at 202.

This Court also quoted from *Illinois Central R Co v Illinois* v Illinois, 146 US 387, 435; 13 S Ct 110; 36 L Ed 1018 (1892), and acknowledged its approval of the doctrine thereby announced in *People v Silberwood*, 110 Mich 103, 107-108; 67 NW 1087 (1896). Yet the *Hilt* Court declined to abandon the principle that under Michigan law, riparian owners on the Great Lakes own to the water's edge. To the contrary, *Hilt, supra,* 252 Mich at 223, overruled two

then-recent cases — *Kavanaugh v Rabior,* 222 Mich 68; 192 NW 623 (1923) and *Kavanaugh v Baird,* 241 Mich 240; 217 NW 2 (1928) — that departed from earlier rules of property, opining (as quoted with approval in *Bott v Natural Resources Commission*, 415 Mich 45, 83; 327 NW2d 838 (1982)):

> The doctrine of stare decisis has been invoked. The point has much force. Titles should be secure and property rights stable. Because a judicial decision may apply to past as well as to future titles and conveyances, a change in a rule of property is to be avoided where fairly possible. But where it clearly appears that a decision, especially a recent one, was wrong and continuing injustice results from it, the duty of the court to correct the error is plain. The *Kavanaugh Cases* were decided in the recent years in 1923 and 1928, respectively. They enumerated principles at variance with settled authority in this State and elsewhere, under which real estate transactions long had been conducted and given legal effect by courts and citizens, and themselves, disregarded the doctrine of stare decisis by overruling the *Warner Case* [*People v Warner,* 116 Mich 228; 74 NW 705], decided in 1898. The rules they stated are not as old as the rules they abrogated. When to that are added the considerations that they operated to take the title of private persons to land and transfer it to the State, without just compensation, and the rules here announced do no more than return to the private owners the land which is theirs, the doctrine of stare decisis must give way to the duty to no longer perpetuate error and injustice.

Rejecting the appeal to judicially advance the movement for public control of Michigan's shores, the *Hilt* Court further explained:

> The movement is most laudable and its benefits most desirable. The state should provide proper parks and playgrounds and camping sites and other instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the state has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the state, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The state must be honest.

Hilt, 252 Mich at 224. *Hilt* remains the law in Michigan.

In *Bott v Natural Resources Commission, supra*, 415 Mich at 62, this Court once again rejected a specific invitation to ignore *stare decisis* and concomitant just compensation principles by expanding the public trust doctrine. After noting that the governing "rules of property law"

had been established for over 60 years, generating consequent riparian reliance and resulting investment-backed expectations, the *Bott* Court flatly rejected an expansion of the reach of the public trust doctrine:

> The legislature can, if it is thought to be sound public policy to enlarge public access to and the use of inland waters, pass laws providing for the enlargement of the rights of the public . . . and for compensation of landowners affected by the enlarged servitude.

Id. at 62. [5] Noting several important policy concerns, including the court's "inability to compensate riparian owners for the loss of a valuable right," the *Bott* Court concluded: "We believe that this Court is not an appropriate forum for resolving the competing social values which underlie this controversy." *Id.* at 86.

Yet a third attempt to expand public trust rights over private property was addressed most recently by this Court in *Peterman v DNR, supra.* Asserting an overriding navigational servitude, the Michigan Department of Natural Resources refused to compensate a riparian owner when its boat launch on neighboring property destroyed a riparian owner's beach. The Court wholly rejected that argument as it related to the Petermans' upland. 446 Mich at 200. Although the Court acknowledged the existence of a navigational servitude below the ordinary high water mark, the Court held that the Petermans were still entitled to compensation "for the

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[5] The Michigan Supreme Court similarly held in *Terrien v Zwit*, 467 Mich 56, 67; 648 NW2d 602 (2002):

> The public policy of Michigan is *not* merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law." . . . As a general rule, making social policy is a job for the Legislature, not the courts.

Where, as here, any revision of long-settled property rights would require the payment of just compensation to adversely affected property owners, *Bott, supra,* the Legislature, as the sole branch of government with the power of the purse, *Univ of Michigan Regents v State*, 395 Mich

loss of their riparian rights" because "the loss of the beach below the ordinary high water mark was unnecessary to construct the boat launch." *Id.* at 202. Clearly, this Court understood that despite the existence of a navigational servitude, the Petermans' destroyed uplands were not owned in trust by the State, but rather, by the Petermans. The *Peterman* Court cited with approval the *Hilt* Court's prohibition on the taking of private lakeshore without compensation. *Id.* at 193.

In a period of 64 years, and as recently as 1994, this Court has thus at least thrice considered, and definitively rejected, attempts to expand public rights at the expense of established private property rights, and has acknowledged the existence of an appropriately limited public trust doctrine in this State.

In light of this precedent, the Court of Appeals' expansion of the geographic reach of the public trust doctrine so as to give the State legal title to previously private property above the water's edge is impermissible and must be countermanded as contrary to established Michigan law. Indeed, the Court of Appeals, by abrogating established property rights, not only contravened fee titles to riparian and littoral lands, but violated this Court's repeated holdings that, unless and until a Michigan Supreme Court decision is overruled, the Court of Appeals, although free to criticize, must conform its rulings to existing precedent. *Boyd v W G Wade Shows*, 443 Mich 515, 523; 525 NW2d 544 (1993); accord *Agostini v Felton*, 521 US 203, 237; 117 S Ct 1997; 138 L Ed 2d 391(1997).

Furthermore, this Court has uniformly held that the public trust doctrine does not exist in a vacuum, and expansion of the reach of the public trust correlatively shrinks private property rights otherwise protected by the Constitution. In *Hilt v Weber*, this Court held:

52, 70-71; 235 NW2d 1 (1975), should be regarded as the exclusive proper forum for seeking

> [T]he state has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the state, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The state must be honest.

252 Mich 198, 224; 233 NW 159 (1930). And as this Court more recently observed in *Bott v Commission of Natural Resources, supra*, 415 Mich at 78, 84:

> Even were it granted that a need for expanded public recreational uses is a value that has hardened into social consensus, we cannot ignore the conflict with another well-recognized norm, the unfairness of eliminating a property right without compensation.
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> * * *
>
> In *Hilt,* this Court squarely confronted the question of the relative priority that should be given to claims of public recreational need and to claims that existing property rights should not be taken without compensation, and re-established prior precedent protective of long-standing property rights.

Plaintiff-Appellant, like the dissenters in *Bott*, would treat private property rights as inferior to the rights of the public — an untenable result that truly would "threaten individual liberty." Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources*, 71 Iowa L Rev 631, 702-703 (1986) (warning that "total erosion of private property rights" in the name of the public trust "ultimately would threaten individual liberty"). In any case, it would violate the Fifth Amendment and Const 1963, art 10, § 2, unless the Court were also to usurp, in violation of Const 1963, art 3, § 2 (separation of powers clause), the Legislative power of the purse in order to pay just compensation to all such riparian landowners adversely affected by the Court of Appeals ruling.

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such a drastic change in the law of property.

II. Taking Title To Private Property Without Just Compensation Violates Fundamental Principles of Federal Constitutional Law.

Standard of Review

As previously stated, summary disposition generally, constitutional issues, and property rights are all subject to *de novo* appellate review (*see* Issue I and authorities there cited).

Analysis

Whether effectuated as the result of surveying errors, encroachment, physical seizure or judicial revisionism, a transfer of title from private ownership to the state or public is unconstitutional and requires payment of just compensation.

The Court of Appeals in this case placed legal title to the Goeckels' property in the hands of the State, leaving the Goeckels with no more than a license to use their property and destroying their right to sell, lease, license, or devise that property. Moreover, future state action might significantly encumber the rights of riparian owners to exclusively control such land. For instance, the Michigan Legislature can, and has, enacted bills directed specifically at burdening the use of public trust land. *See, e.g.*, The Great Lakes Submerged Lands Act, MCL 324.32502 (1994) (which, it should be noted, is framed in terms of lands "not patented.")

Transferring property rights from private landowners to the State of Michigan or to some amorphous public domain potentially endangers even those rights that the Court of Appeals found vested in riparian owners. *Glass, supra*, 262 Mich App at 45-46 ("[The Great Lakes Submerged Lands Act] contains no provision guaranteeing any member of the public the right to walk on a beach fronting private property along one of the Great Lakes."). Fortunately, the Legislature was mindful of important private property concerns when it enacted the Submerged Lands Act. *Id.* ("[The Great Lakes Submerged Lands Act] specifically preserves those riparian rights set forth in *Hilt* and its progeny."). There is no guarantee, however, that the Legislature

will take the same concerns into account in the future, and the Legislature, under the Court of Appeals' ruling, seems to have a free hand to do as it pleases. The State, however, cannot redefine the rules for determining title to property, so as to take away a private person's property without just compensation, without running afoul of the Fifth Amendment.

As Justice Stewart stated in *Hughes v Washington*, 389 US 290, 294-98; 88 S Ct 438; 19 L Ed 2d 530 (1967) (Stewart, J, concurring), a case in which a property owner sued to determine the ownership of accretions that had gradually formed along her property by the ocean:

> Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners . . . . Like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation. . . . For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. . . . Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property – without paying for the privilege of doing so.

Both the Supreme Court and other federal courts have repeatedly held that when the government takes title to real property, a categorical violation of the Fifth Amendment's Just Compensation Clause occurs for which compensation must be paid. *See Yee v City of Escondido*, 503 US 519, 522; 112 S Ct 1522; 118 L Ed 2d 153 (1992) ("Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation."). Thus, even if riparian owners continue to exercise exclusive control over the area in question, the Michigan Court of Appeals' decision still effects a "classic" form of taking necessitating payment of just compensation. *See United States v Security Indus Bank*, 459 US 70, 78; 103 S Ct 407; 74 L Ed 2d 235 (1982) (describing the "classical taking" as one where the "government acquires for itself the property in question.").

Title ownership is always of critical import for takings challenges. In *Mannatt v United States,* 48 Fed Cl 148 (2000), the federal court that hears all takings claims for monetary damages against the United States examined an instance where the government required a landowner to give up title to his property. In *Mannatt*, the landowner had purchased land in reliance on a government survey. The government determined that it had been mistaken in the original survey and it resurveyed the land, resulting in plaintiffs' loss of title to a portion of their property. The court held that even if a mistake caused title to private land to transfer to the government, such a transfer constituted a taking: "[W]hen the government improperly resurveys lands so as to enlarge its interest in the property, and then effectively takes the property, such resurvey plus the assertion of control of the property will constitute a taking by inverse condemnation." *Id.* at 155 (citations omitted).

Similarly, the transfer of property to a third party is a taking. In *Sioux Tribe of Indians of the Brule Reservation, SD v United States*, 161 Ct Cl 413 (1963), a surveying error resulted in land belonging to the tribe being conveyed to a third party. Rejecting the government's argument that this was not a taking under the Fifth Amendment, the court reasoned: "Defendant says an erroneous survey does not constitute a taking. This is correct, but a taking did occur when the United States appropriated the lands actually belonging to plaintiff and sold them." *Id.* at 415; *see also United States v Pueblo of Taos*, 207 Ct Cl 53, 57 (1975) ("The Supreme Court has repeatedly held that the deprivation of an Indian tribe of its property in land, by an error of the United States as to the location of a boundary or the devolution of a title, constitutes a Fifth Amendment taking if the property is then turned over to another owner.") (citations omitted).

In *Pettro v United States*, 47 Fed Cl 136 (2000), the Court of Federal Claims found a compensable taking where the government mistakenly believed it was the owner of mineral

rights actually owned by the plaintiff. In *Pettro*, instead of filing a condemnation proceeding to obtain the plaintiff's mineral rights, the government, after receiving the results of a title search, informed the plaintiff that his title to the minerals had merged with the surface estate and had been conveyed to the United States by the surface estate owner. The government also told the plaintiff that he had to cease all work on the site, remove all structures located thereon, and restore the site (the site was a gravel pit). Although after resolution of the government's quiet title suit it was determined that the plaintiff was the legal owner of the mineral rights, the court found that until that determination was made, the government had effectively deprived plaintiff of his ownership interest: "[T]he government's words and actions indicated to all involved that the United States considered itself the owner of the sand and gravel rights. Thus, the court holds that the Forest Service's actions constituted a taking, as they temporarily deprived [plaintiff] of his entire property interest." *Id.* at 148 (citations omitted).

Even where actual title is not taken, but the property owner is deprived of a fundamental aspect of property ownership, such as the right to dispose of the property, courts have held that just compensation is required. In *Cienega Gardens v United States*, 331 F3d 1319 (Fed Cir 2003), for example, real estate developers alleged that the enactment of two statutes took their contractual right to prepay their 40-year HUD mortgages after 20 years. The Federal Circuit held that the statutes at issue could be compared to a type of physical invasion because they "authorize the continuing physical occupation of particular developers' properties to address a societal shortage of low-income housing," by curtailing the plaintiffs' right to exclude low-rent tenants. *Id.* at 1338. The court further found the fact that the statutes curtailed the plaintiffs' right to transfer—the right to sell or lease the properties to parties not included in the government programs—made the government regulation "extraordinary," amounting to a taking, "even

absent a showing of economic harm or interference with investment-backed expectations." *Id.* at 1338 (citing *Hodel v Irving*, 481 US 704, 715-716; 107 S Ct 2076; 95 L Ed 2d 668 (1987) (holding that where a statute abrogated the common-law right to devise to one's heirs even as to a small portion of a property, there was a taking); *see also United States v Peewee Coal Co*, 341 US 114; 71 S Ct 670; 95 L Ed 809 (1951) (holding that government had taken a coal mine where the fundamental attributes of ownership—the right to control and use one's own facilities for one's own purposes—were transferred to the government).

Obviously, landowners cannot dispose of or devise riparian property if title is now held by the State of Michigan. Thus, the Court of Appeals' decision abrogates fundamental civil rights. *Hodel*, 481 US at 716 ("The right to pass property on...has been part of the Anglo-American legal system since feudal times...Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional.").

Even where the occupation of property has minimal economic impact on the owner of title, courts have still ruled that a taking requiring payment of just compensation occurs. *See Nollan v California Coastal Comm'n*, 483 US 825, 831-832; 107 S Ct 3141; 97 L Ed 2d 677 (1987) ("[W]here governmental action results in a permanent physical occupation of the property, by the government itself or by others, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.") (citations and internal quotation marks omitted); *see generally* Barton H. Thompson, *Judicial Takings*, 79 Va L Rev, 1449, 1450-1451 (1990) ("If the executive or legislative branch of a state government were to order private beachfront owners to permit the public onto the portion of their beaches between the mean high tide line and the vegetation line, without compensation, the United States Supreme Court would

almost certainly hold that the state had taken the beachowners' property in violation of the Constitution.").

Importantly, the United States Constitution precludes states from simply altering the status of private land without justly compensating its previous owners. *Lucas v South Carolina Coastal Comm'n*, 505 US 1003, 1031; 112 S Ct 2886, 2901; 120 L Ed 2d 798 (1992) ("[A] State, by *ipse dixit*, may not transform private property into public property without compensation...") (citations and internal quotation marks omitted).

RELIEF REQUESTED

For all the foregoing reasons, *Amicus Curiae* therefore requests that the Court correct and modify the decision of the Court of Appeals so as to makes its holding consistent with *Hilt v Weber*.

Respectfully submitted,

Allan Falk (P13278)
Allan Falk, P.C.
Counsel for Defenders of Property Rights
2010 Cimarron Drive
Okemos, MI 48864
(517) 381-8449

with

Nancie G. Marzulla*
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., NW, Suite 410
Washington, DC 20036
(202) 822-6770

*Admitted to practice in the District of Columbia

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